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NO. 89-7024

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WARREN MCCLESKEY, *
* Petitioner,
v. *
*
WALTER D. ZANT, WARDEN, *
*
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Did the Eleventh Circuit Court of Appeals properly find that Petitioner had abused the writ by deliberately abandoning a claim raised in his first state habeas corpus proceeding, particularly when the district court's opinion in this case which found a constitutional violation has been reversed?

2.

Is the harmless error analysis conducted by the Eleventh Circuit necessary for a resolution of the abuse of the writ issue?

3.

Did the Eleventh Circuit Court of Appeals properly conduct its harmless error analysis as a mixed question of fact and law and give appropriate deference to any factual findings made by he district court and thus appropriately find that any alleged constitutional violation was harmless beyond a reasonable doubt?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On June 13, 1978, the grand jury of Fulton County, Georgia, returned a three count indictment against the Petitioner, Warren McCleskey, and his three co-indictees, David Burney, Bernard Depree and Ben Wright, Jr., charging said individuals with the offense of murder and with two counts of armed robbery. The Petitioner was tried separately beginning on October 9, 1978, and was found guilty on all three counts. The jury imposed the death penalty after a separate sentencing proceeding on the murder charge, finding that: (1) the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony and (2) the offense of murder was committed against a peace officer, corrections employee or fireman while engaged in the performance of his official duties. See O.C.G.A § 17-10-30(b)(2) and (b)(8). Consecutive life sentences were imposed on the two counts of armed robbery.

The Petitioner then appealed his convictions and sentences to the Supreme Court of Georgia. The Supreme Court of Georgia affirmed the convictions and sentences. McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146 (1980). The Petitioner subsequently filed a petition for a writ of certiorari to the Supreme Court of the United States asserting that the trial court improperly admitted evidence of other crimes, that the jury's discretion was not properly channelled and that there was a deliberate withholding of the confession to Offie Evans. Certiorari was denied by the Court. McCleskey v. Georgia, 449 U.S. 891 (1980).

On January 5, 1981, the Petitioner filed a petition for habeas corpus relief in the Superior Court of Butts County, Georgia, as Case No. 4909. In the original petition the Petitioner raised numerous allegations including the alleged failure to disclose an "arrangement" with a police agent or

informer (Offie Evans) and the alleged deliberate withholding of the statement made by the Petitioner to Evans. Petitioner subsequently filed an amendment to that petition in which he challenged the introduction into evidence of his statements to "an informer" and raised a challenge essentially to the sufficiency of the evidence. (Respondent's Exhibit No. 3). A hearing was held by the court on January 30, 1980. By way of order dated April 8, 1981, the superior court denied habeas corpus relief. (Respondent's Exhibit No. 4). The Supreme Court of Georgia denied the subsequent application for a certificate of probable cause to appeal on June 7, 1981. A subsequent petition for a writ of certiorari was denied by the Supreme Court of the United States on November 30, 1981.

On December 30, 1981, the Petitioner filed a petition for habeas corpus relief in the United States District Court for the Northern District of Georgia. Among other allegations the Petitioner asserted the failure to disclose an "understanding" with witness Evans.

Evidentiary hearings were held before the district court in August, 1983, and in October, 1983. An order was entered on February 1, 1984, in which the court rejected all the issues raised in the petition except for the alleged undisclosed deal with witness Evans. The court directed that habeas corpus relief be granted as to that issue and ordered that the conviction and sentence for malice murder be set aside, but affirmed the convictions and sentences for armed robbery. McCleskey v. Zant, 580 F. Supp. 338 (M.D.Ga. 1984).

Both parties appealed the decision of the district court to the United States Court of Appeals for the Eleventh Circuit. On March 28, 1984, the Eleventh Circuit Court of Appeals directed that the case be heard initially by the court sitting en banc. On January 29, 1985, the en banc court issued an opinion which affirmed all convictions and sentences and considered the following issues: (1) Giglio claim relating to the testimony of Offie Evans; (2) ineffective assistance of counsel; (3) burden-shifting jury charge; (4) discrimination in the application of the death penalty; and (5) prosecution-prone jury. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc).

The Petitioner then filed a petition for a writ of certiorari in the Supreme Court of the United States. In that petition, the Petitioner asserted that the death penalty was discriminatorly applied, that there was a violation of Giglio v. United States, 405 U.S. 150 (1972), based upon the testimony of Offie Evans, that the charge on intent was impermissibly burden-shifting and that the jury was impermissibly qualified as to capital punishment. (Respondent's Exhibit E). This Court subsequently granted the petition for a writ of certiorari limited to the consideration of the application of the death penalty. On April 22, 1987, the Court issued an opinion concluding that the Petitioner had not shown discrimination in the imposition of the death penalty as to his

case and affirmed the decision of the Eleventh Circuit Court of Appeals. McCleskey v. Kemp, 481 U.S. ___, 107 S.Ct. 1756, reh. den., 107 S.Ct. 3199 (1987). On or about May 16, 1987, Petitioner filed a petition for rehearing by that Court. In that petition, Petitioner reasserted his claim of ineffective assistance of counsel at the sentencing phase, reasserted his claim relating to the charge on intent and reasserted his claim relating to a violation of Giglio v. United States, asserting that the decision in United States v. Bagley, 473 U.S. 667 (1985), justified the granting of the petition. (Respondent's Exhibit F). On June 8, 1987, this Court denied the petition for rehearing.

On June 8, 1987, a successive state habeas corpus petition was filed in the Superior Court of Butts County, Georgia. That petition raised the following allegations: (1) the prosecutor discriminated in the use of peremptory strikes; (2) there was intentional discrimination in this case; (3) the state failed to disclose impeaching evidence (the alleged "deal" with Offie Evans); (4) the trial court erred in denying funds for a ballistics expert; and (5) the prosecutor improperly referred to appellate review in his argument at the sentencing phase. (Respondent's Exhibit G). On June 18, 1987, Respondent filed a motion to dismiss asserting that the petition was successive. (Respondent's Exhibit H).

On June 22, 1987, Petitioner filed an amendment to case number 87-V-1028 in Butts County. In that petition the Petitioner raised two allegations, that is, that Offie Evans was acting as an agent for the State at the time the Petitioner made statements to Evans and that the prosecutor failed to correct alleged misleading testimony by Evans. (Respondent's Exhibit I).

A hearing was held before the Superior Court of Butts County, sitting in Henry County. (Respondent's Exhibit O). On July 1, 1987, the state habeas corpus court entered an order granting Respondent's motion to dismiss finding that the issues were either barred from reconsideration under the principles of res judicata or could reasonably have been raised in the previous petition. (Respondent's Exhibit P).

On July 2, 1987, Petitioner filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. (Respondent's Exhibit Q). On July 7, 1987, the Supreme Court of Georgia denied the application.

On July 7, 1987, Petitioner filed a second federal habeas corpus petition in the United States District Court for the Northern District of Georgia. After hearings were held by the district court on July 8, 1987, July 9, 1987, and August 10, 1987, the district court entered an order on December 23, 1987, granting habeas corpus relief only as to Petitioner's murder conviction and sentence based upon the finding of a violation of Massiah v. United States, 377 U.S. 201 (1964). Respondent filed a timely notice of appeal from this ruling.

On April 12, 1988, the Respondent filed a motion for remand in thie Eleventh Circuit Court of Appeals based upon the availability of Offie Gene Evans. By order dated May 2, 1988, and received by counsel on May 5, 1988, Respondent filed a motion to stay the briefing schedule pending the filing of a Rule 60(b) motion in the district court. On May 6, 1988, Respondent filed the Rule 60(b) motion in the district court.

Pursuant to the June 17, 1988, order of the district court, both parties conducted discovery including taking the deposition of Offie Evans on July 13, 1988. After additional pleadings were filed, the Court entered an order on January 10, 1989, denying the motion for relief from judgment.

A panel of the Eleventh Circuit Court of Appeals entered an opinion on November 22, 1989, amended on December 13, 1989, specifically reversing the finding of the district court and concluding that the district court abused its discretion by failing to find an abuse of the writ and that the Petitioner had abused the writ by deliberately abandoning the Sixth Amendment Massiah claim and that any error based on a Massiah violation was harmless. McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989). Rehearing and rehearing en banc were denied on February 6, 1990. Petitioner has now filed the instant petition challenging the decision of the Eleventh Circuit Court of Appeals.

PART TWO

STATEMENT OF FACTS

The evidence presented at Petitioner's trial showed that on May 13, 1978, he and three co-indictees committed a robbery at the Dixie Furniture Store in Atlanta, Georgia. During the course of the robbery, the Petitioner entered the front of the store while his three co-indictees entered the back. Petitioner was positively identified at trial as one of the participants in the robbery. (T. 231-232, 242, 250).

Following the arrest of the Petitioner, he was taken to Atlanta, Georgia. On May 31, 1978, the Petitioner made a confession to the police in which he admitted his participation in the robbery, but denied that he shot Atlanta Police Officer Frank Schlatt. A Jackson v. Denno hearing was held at trial and the court determined that the confession was freely, intelligently and voluntarily made. (T. 426-505).

Petitioner's co-indictee, Ben Wright, testified at trial and related the details of the robbery and murder. Ben Wright testified that while he carried a sawed-off shotgun, the Petitioner carried a .38 caliber nickle-plated, white-handled pistol. (T. 654-656,

648-649). Wright testified that co-indictee Burney had a blue steel, snub-nosed .32 caliber pistol, while Depree had a blue steel .25 caliber pistol. (T. 649-651).

While Depree, Burney and Wright held several employees in the back of the store, the Petitioner was in front. Employee Classie Burnwell had activated a silent alarm, resulting in the arrival of Officer Frank Schlatt. Shortly after Schlatt entered the front of the store, he was shot. After hearing two shots, Wright observed the Petitioner running out of the front of the store. Wright, Depree and Burney ran out of the back. When they all arrived at the car, Petitioner stated that he had shot the police officer. (T. 658-9).

Mr. Everett New and his wife were stopped in their automobile at a red light near the Dixie Furniture Store. They observed Officer Schlatt arrive at the scene, saw him draw his pistol and enter the store. (T. 330). Mr. New stated that approximately thirty seconds later he heard two shots and shortly thereafter observed a black man running out of the front door carrying a white-handled pistol; however, he could not identify that individual. (T. 331-333).

Petitioner testified in his own behalf at trial and stated that he knew Ben Wright and the other co-indictees, but that he had not participated in the robbery. He relied on an alibi defense, stating that Wright had borrowed his car and that the Petitioner had spent the day at his mother's house and at some apartments in Marietta playing cards. Petitioner named several people who had been present at the apartments, but did not present any of those persons for his defense. (T. 811).

Petitioner denied that he made a statement to Lieutenant Perry that he had participated in the robbery and stated that he made a false statement to Detective Jowers because of the alleged evidence the police had against him (two witnesses who had identified him, the description of his car and a statement from David Burney), because of his prior convictions and because he did not have a good alibi. (T. 823-4).

Petitioner was also identified at trial by two witnesses who had observed him take part in a prior similar robbery. Mr. Paul David Ross, manager of the Red Dot Grocery Store, had identified the Petitioner previously from a set of colored photographs. Ross also testified that during the course of the Red Dot Robbery, his nickle-plated .38 revolver was taken.

Ms. Dorothy Umberger also observed the Petitioner during the April 1, 1978, robbery of the Red Dot Grocery Store. She testified that she was ninety percent certain that the Petitioner was one of the men who had robbed her. She based her identification on viewing him at the scene of that crime. Ms. Umberger had also identified the Petitioner from a photographic display.

In rebuttal to the defense case, the State presented the testimony of Arthur Keissling. This witness testified that he had observed the Petitioner participating in the robbery of Dot's Produce on March 28, 1978. His identification of the Petitioner was positive. (T. 887-889, 896).

The State also presented the testimony of Offie Gene Evans in rebuttal. Mr. Evans had been incarcerated in Fulton County jail in a cell located near the Petitioner and Bernard Depree. Evans related that the Petitioner had talked about the robbery while in custody and had admitted shooting at Officer Schlatt. (T. 869-870).

In Petitioner's statement of facts he addresses the testimony presented before the district court and other aspects of the issues. Respondent would specifically take issue with Petitioner's assertion that the facts allegedly showing a conspiracy are not seriously at issue and would note, as will be set forth subsequently, that Respondent

has always contested any assertion of a "conspiracy" and has always contested any finding of a Massiah violation. Remaining facts which relate to the substantive issue of a Massiah violation will be addressed subsequently.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT PETITIONER HAD ABUSED THE WRIT BY DELIBERATELY ABANDONING THE CLAIM OF A MASSIAH VIOLATION PRIOR TO FILING HIS FIRST FEDERAL HABEAS CORPUS PETITION AND PROPERLY FOUND THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT MAKING THIS FINDING.

Petitioner first asserts that the Respondent should not be allowed to assert abuse of the writ after the state allegedly concealed a constitutional violation, thus complaining that the state had unclean hands. Petitioner relies upon factual findings by the district court concerning an alleged secret relationship with an informant. Respondent would note that those factual findings have at all times been disputed by the Respondent and in fact that holding by the district court was

reversed and the Eleventh Circuit Court of Appeals specifically did not address the merits of the claim; therefore, Respondent would assert that any reliance on any factual findings by the district court or legal conclusions by the district concerning a Massiah violation is simply inappropriate.

Petitioner also complains that the Eleventh Circuit Court of Appeals failed to apply a presumption of correctness to alleged factual findings by the district court in relation to the abuse of the writ analysis. Respondent submits that Petitioner is confusing factual findings with legal conclusions. The Eleventh Circuit Court of Appeals specifically acknowledged the factual findings by the district court, but determined that the district court itself was applying an incorrect meaning to the deliberate abandonment standard. The meaning of deliberate abandonment is a legal question, not a factual question. Therefore, a conclusion by the district court that there was no deliberate abandonment necessarily must take into consideration whether that court applied a correct standard. Similarly, although the district court may have found that reasonably competent counsel could not have done certain things, this is not a pure factual finding as what is reasonably competent counsel is a legal question. As will be set forth in more detail subsequently, Respondent submits that the Eleventh Circuit Court of Appeals was correct in its conclusion that the district court abused

its discretion in failing to find an abuse of the writ and that there was a proper finding of a deliberate abandonment of the claim.

Respondent would also note that in arguing the case to this Court Petitioner has blatantly ignored the fact that the Eleventh Circuit Court of Appeals was not examining this case for the first time, but had examined Mr. McCleksey's case en banc several years previously and had specifically examined at that time an allegation relating to the testimony of Offie Evans and was fully aware of the circumstances. In fact, the district court in this case is the one who is ignoring prior holdings of the Eleventh Circuit Court of Appeals rather than the Eleventh Circuit ignoring factual findings by the district court.

The question raised in the instant case in relation to the alleged violation of Massiah v. United States, 377 U.S. 201 (1964), is not one of inexcusable neglect but of deliberate abandonment of an issue. Thus, different considerations come into play than would be considered when faced with an allegation of inexcusable neglect. Inexcusable neglect necessarily involves questions of information known to a petitioner and whether he could have reasonably raised a claim. Deliberate abandonment, which is what is present in the instant case, involves simply a consideration of whether the issue was known and the petitioner or his counsel made a knowing choice not to pursue the claim after having raised it previously.

A review of the testimony presented to the district court at the first hearing shows that there is no question but that the issue was abandoned. First of all, a reference to exhibits submitted to the district court by the Respondent reveals that the issue was raised in the first state habeas corpus petition and was also asserted in the amendment to the first state habeas corpus petition. See Respondent's Exhibit H and attachments thereto. It is also uncontroverted that Petitioner did not raise the claim in the first federal habeas corpus petition. As noted by the district court at the first hearing, it was imminently clear that Evans was located in a jail cell near the Petitioner, which situation would always raise a possibility of a Massiah issue and there was also testimony at the trial that Evans relayed information to a deputy. The district court was concerned as to why there were no previous inquiries as to when Evans might have become an agent of the state, if he did at all. (R4-5). The district court further noted that knowing that Petitioner was located near Evans at the jail and that Evans had apparently cooperated with law enforcement officers should have put counsel on notice to inquire when the cooperation began. Id. at 19. Counsel for the Petitioner never asked either the assistant district attorney or any of the police officers when Mr. Evans began cooperating with them.

Further, Mr. Robert Stroup testified before the district court that he became counsel in this case in April, 1980. He raised more than twenty issues in the state habeas corpus proceeding first filed in Butts County and it occurred to him that there might be a Massiah claim. He felt it was suggested just based on the facts. He made some minimal efforts to seek information, but those efforts fell short of any kind of in depth inquiry. (R4-31-3). He specifically recalled amending the state habeas corpus petition which he viewed as raising a claim of a violation of Massiah. He also knew by the time of the state habeas corpus proceeding that Evans had testified in another case involving the same assistant district attorney. Mr. Stroup's only excuse for why he did not pursue the claim in the first federal habeas proceeding was that he felt that he did not have facts to support the claim. This is despite the fact that Mr. Stroup at no time talked to Detectives Harris or Dorsey prior to or subsequent to the state habeas corpus proceeding and did not recall talking to Deputy Hamilton even though Hamilton testified at the trial. He did not seek to question Detective Dorsey even after Evans mentioned his name at the state habeas corpus hearing and did not subpoena any records regarding the informant claim.

The district court originally specifically found that there was a deliberate withholding of the issue of an ab initio Massiah violation because it was clear that Mr. Stroup thought about the issue at the state habeas corpus stage and decided not to pursue it. (R.4-59).

After all the hearings were conducted, the district court judge changed his mind and decided, "Petitioner cannot be said to have intentionally abandoned the claim." (R3-22-24). The only basis for this decision by the district court was that court's conclusion that counsel was unaware of the written statement of Offie Evans and that, thus, the factual basis for the claim was not known. This clearly reflects an abuse of discretion on the part of the district court as this holding is totally contrary to the original holding of district court in which that court had already found that there was sufficient information in the record to put counsel on notice of a possible Massiah violation even without a copy of a written statement of Offie Evans.

The question presented to the circuit court was whether the district court abused its discretion in simply changing its mind and whether that court should have concluded that based upon counsel's conduct, there had been an abuse of the writ as to this issue. In this case it is clear that counsel knew of the existence of the possibility of raising the claim and simply chose as a matter of tactics not to present the claim in the first federal habeas corpus petition. The simple assertion that counsel did not think he had sufficient facts to prove the claim is insufficient to overcome the barrier of an intentional abandonment of an issue. Insofar as the district court concluded that counsel did not intentionally abandon this

claim, this is certainly a clearly erroneous finding. The record is clear that counsel raised the claim in the state habeas corpus proceeding, failed to raise it in the first federal habeas corpus proceeding and testified as to the basis for his not raising the claim. Counsel obviously felt that he had enough information to raise the claim in the state habeas corpus proceeding in the first place and also raised other claims in the first federal habeas corpus petition which he had been unable to factually substantiate, including his claim of discrimination. If counsel felt that there was any possible merit to the claim, or was even suspicious, he certainly should have continued to pursue the claim in the district court to avoid possible piecemeal litigation. Counsel then could have sought discovery in the district court, as was done on other issues in the first federal habeas corpus proceeding, and the issue would have been litigated years earlier rather than at this late stage of the proceedings. Under these circumstances, Respondent submits that this is clearly the type of needless litigation that is contemplated by Rule 9(b). The cases contemplate courts not considering issues that not only were known to counsel at the time of the filing of the first federal habeas corpus petition, but which counsel admits he evaluated and chose deliberately not to raise, even after having raised them in the state courts.

Further, Respondent submits that counsel certainly had reason to know that there was a written statement of Offie Gene Evans and certainly should have made some effort to obtain that statement prior to this most recent series of collateral attacks.

The trial court conducted an in camera inspection of certain specified material noting in its order, "The court finds that although the documents might become material for rebuttal at trial, they are not now subject to discovery." (T.R. 46). Thus, at this point, counsel knew that there was material which was not disclosed to defense counsel but which was the subject of an in camera inspection. Clearly, trial counsel was free to renew the request at or during trial. Further, during cross-examination of the Petitioner at trial, counsel for the Petitioner objected to cross-examination by the assistant district attorney indicating that he had asked for all statements by the Petitioner. The trial court stated, "He has a statement which was furnished to the Court but it doesn't help your client." (T. 830). Again, this points to the fact that there is some type of written statement which is part of the material included in the in camera inspection which was not disclosed by the trial court. Although this does not clearly indicate that it was in fact a statement of Evans, it certainly indicates that it was a statement made by the Petitioner himself to someone. The only possible conclusion is that it

was a statement made to Offie Evans. The only way for the police to get any written information relating to this was to either obtain a written statement from Evans or make a written report concerning a statement given to them by Evans pertaining to the statement made to Evans by the Petitioner. Certainly, this puts counsel on notice that there is a written document which was not seen by defense counsel prior to trial pertaining to statements made by the Petitioner while in jail.

Further, on direct appeal trial counsel raised an allegation relating to the failure to disclose statements of the Petitioner and the alleged withholding of impeaching evidence. In the brief counsel stated, "Offie Gene Evans' statement contains substantial impeachment value." (See Attachment to Respondent's Exhibit H). In the opinion on direct appeal, the court held, "The prosecutor showed the defense counsel his file, but did not furnish this witness' [Evans'] statement." McCleskey v. State, 245 Ga. 108, 112, 263 S.E.2d 146 (1980). This seems to be a clear indication that the Georgia Supreme Court at least assumed there was a statement by Evans which was part of the in camera inspection. Certainly, if the Supreme Court of Georgia can make that determination from the record then present counsel can also make such a determination.

In addition to the above, a reading of the entire state habeas corpus proceeding shows that counsel most certainly should have been aware of the fact that there was some type of written statement as of the time of that proceeding. Counsel has asserted that he assumed he had the entire prosecutor's file. This is clearly not the case as the record makes it clear that what was given to counsel was the file given to defense counsel. It was clear from the trial transcript and the testimony of defense counsel at the state habeas corpus hearing that there were certain matters not included in the information provided to defense counsel. Present counsel never asked the prosecutor for the documents which were part of the in camera inspection and never sought them in the state habeas corpus proceeding.

A review of trial counsel John Turner's testimony in the state habeas corpus court shows that counsel clearly should have been aware that there was a statement. [1] During the questioning of Mr. Turner, he was asked about the testimony of Offie Evans and whether that was a surprise to him. Mr. Turner responded as follows:

---

[1]The state habeas corpus transcript was included as an Exhibit to the first federal habeas corpus case in the district court in No. C81-2434A. The district court stated it would take judicial notice of those records. The Respondent requests that this Court do the same.

Well, yes and no. And the reason I qualify that is because one of the first things I said to Mr. McCleskey when I interviewed him at the Atlanta Jail prior to the preliminary hearing was not to make any statements to anybody about the incident. In fact, I went so far as to say to give him the analogy that a fish can't get caught unless it opens its mouth to bite the hook. I had talked with him constantly about that in terms of have you said anything to anybody. The bottom line was when I got the witness list, I noticed that at some stage some Deputy's names were on there. The only thing I could conclude that something had been said or possibly had been said. And I asked Mr. McCleskey if he had discussed the facts with anyone there at the jail and his Co-Defendant and he said, "No."

(First state habeas corpus transcript at 76, hereinafter referred to as S.H.T.) The court then went on to state, "Well, I think the question should be why they did not give you a copy of the statement he made if you made a motion for it." Id. It is clear from this that the state habeas corpus court felt that there was a statement in writing referring to what Mr. McCleskey had told Offie Evans. Mr. Turner responded, "Well, I can't answer that question even up to this point in time. That was one of the issues I raised on appeal, the fact that I was never given any indication that the statement existed." Id.

The habeas court went on to inquire of Mr. Turner as to whether he and the prosecutor discussed the matter at all. Mr. Turner responded the following:

> We went over the motions, all of the motions and the only thing he said to me about his file was that there were two things which were not included in the file. One was the Grand Jury testimony of a witness and his logic there was that that was not discoverable. And the other was just a statement he had and he didn't disclose what it was or who the person was in that context.

> They clearly understood and they knew that the motion had been filed. So my thinking on the matter was that I had everything, particularly relating to the statements of the Defendant.

(S.H.T.77). The court then inquired in detail as to the right of a defendant to obtain a copy of his own statement under state law. It was also reiterated that Mr. Turner did not contact Deputy Hamilton prior to trial even though his name was on the list due to the fact that "Mr. McCleskey was quite adamant to the fact that he hadn't said anything incriminating or even mentioned the case or discussed it with anyone." Id. at 79-80.

During cross-examination Mr. Turner further testified that he went over the names on the witness list with the Petitioner, "Particularly with criminal records like Offie Evans. That was the one I can recall specifically asking him about." Id. at 86. The Petitioner told Mr. Turner that he did not know who Offie Evans was. Id.

From a review of all of the above at least from the time of the state habeas corpus hearing, it was the general understanding that there was a statement by the Petitioner which was not disclosed to trial counsel prior to trial. The only logical conclusion is that this is in

reality a statement of Offie Evans relating a statement by the Petitioner or at least a report setting forth the information related by Offie Evans concerning what the Petitioner told him. This is further emphasized during the deposition of the assistant district attorney, Russell Parker.

This deposition was taken by Mr. Stroup on February 16, 1981. During that deposition, Mr. Parker was asked, "Prior to the trial of Warren McCleskey did you have a file which you made available to defense counsel representing Warren McCleskey?" (Parker deposition at 4). Mr. Parker responded, "I had a file I made available to all the defense counsel in this case." Id. (emphasis added) It was again reiterated this was a file made available to defense counsel prior to and during trial. Thus, the file identified at the deposition was the file "that was made available back at pre-trial and trial." Id. at 5. (emphasis added). At no time is there any indication that this file included the matter which was the subject of the in camera inspection, but it was clearly stated that this was the matter given to defense counsel.

Further during the deposition, Mr. Stroup refers to a "statement" from Offie Evans. In response to a question concerning the statement, Mr. Parker clarified so that

counsel would be fully aware of the circumstances and stated, "When you refer to a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter which was made in camera inspection (sic) by the Judge prior to trial." Id. at 8. Petitioner has asserted previously that this simply was unresponsive to the question. This does not undermine the fact that Mr. Parker specifically told counsel for the Petitioner in his deposition taken in the first state habeas corpus proceeding that there was a statement given by Offie Evans, and it was the statement which was the subject of the in camera inspection by the trial judge and it was clearly not a part of the file being turned over to Mr. Stroup at that point in time. To not understand that this refers to a written statement of Offie Evans is inexcusable neglect because the only way not to understand that is not to listen to Mr. Parker in the deposition or not go back and read the deposition after it has been prepared. At the end of the deposition, it was reiterated that there would be a copy provided of "the entire investigative file that was made available to counsel." Id. at 13 (emphasis added). It should be noted that during this deposition the only question asked of Mr. Parker relating to any type of Massiah claim was asked by the assistant attorney general and Mr. Stroup simply

failed to ask any questions whatsoever concerning this issue. In fact, the only testimony given by Mr. Parker on this point was, "I don't know of any instance where Offie Evans worked for the Atlanta Police Department as an informant prior to his overhearing conversations at the Fulton County Jail." Id. at 15. Mr. Stroup never pursued this question except to ask Mr. Parker concerning a possible deal with one of the police officers. Mr. Parker related that he did not see how anything such as that could have occurred. Id. at 18.

Counsel has asserted that all of the above specific references to written statements and to a written statement of Offie Evans was insufficient to put him on notice that there actually was a written statement. This is virtually incredible in light of the fact that the Georgia Supreme Court felt that there was some type of written statement and the fact that the state habeas corpus court in its order in the first state habeas corpus proceeding made the following specific factual findings:

> It is clear that defense counsel had access to the prosecution's discovery file which included statements from all witnesses (except Evans) and investigative reports. (H.T.38; Parker deposition, p. 4).

First state habeas corpus order at 9. (emphasis added).[2] This is a clear factual finding by the state court that there was actually a written statement from Offie Evans and this is a clear indication of the state habeas corpus court finding that all statements from all witnesses except for that statement given by Offie Evans were given to John Turner. Thus, the state habeas corpus court itself also specifically realized that there was a written statement from Offie Evans.

All of the above overwhelming indications of the existence a written statement by Evans and the clear statement by the Georgia Supreme Court that there was some type of written statement and the even clearer statement by Mr. Parker and the state habeas corpus court that there was a written statement, certainly belies any assertion that Petitioner's counsel had no basis for knowing of such a statement.

It is also clear that Petitioner had a legal basis for obtaining a copy of this statement in the first state habeas corpus proceeding or in the first federal habeas corpus proceeding. As was found in the second habeas

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[2]This order is included as an attachment to Exhibit H submitted to the district court and as Respondent's Exhibit No. 4 in the second state habeas corpus proceeding.

corpus proceeding by that court, "There is legal authority giving him the right to access to this document." Second state habeas corpus order at 13. That court found as fact, "There is no valid reason why Petitioner could not have obtained this statement earlier." Id. at 13. Certainly, Petitioner could have sought the statement earlier under the Georgia Open Records Act, could have subpoenaed the statement from Mr. Parker, could have asked for the state habeas corpus court to reopen the record so that he could subpoena the statement to a hearing before that court, could have asked for discovery from the district court in order to obtain that statement or could have requested the court to issue a subpoena for that statement. Petitioner simply failed to do anything to obtain the statement even though there are numerous legal avenues which he could have taken to obtain the statement at that time.

Contrary to Petitioner's assertions, the Eleventh Circuit Court of Appeals did recognize that the district made certain factual findings. The district court specifically found that McCleskey was not aware of a written statement and the Eleventh Circuit Court of Appeals recognized that this was not a clearly erroneous finding. McCleskey, 890 F.2d at 348. What the Eleventh Circuit Court of Appeals did was conclude that the

district court applied an erroneous legal principle. The Court specifically found that "the district court misconstrues the meaning of deliberate abandonment." Id. at 349. What the Eleventh Circuit Court of Appeals concluded was that counsel obviously had some factual basis for a Massiah claim at the time of the filing of the first petition as the issue was raised and "not only was counsel aware that Evans was in a cell next to McCleskey, (footnote omitted), but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's Giglio claim." Id. The Court specifically concluded, and the district court did not find to the contrary, that counsel "made a knowing choice not to pursue the claim after having raised it previously." Rather than disputing the factual finding by the district court, what the Eleventh Circuit Court of Appeals did was take the factual findings and apply a correct legal standard examining a question of deliberate abandonment to conclude that counsel in fact specifically abandoned the claim. There can be no dispute that counsel was aware of the possibilty of such a claim as it was raised in the first state habeas corpus petition and counsel then deliberately chose not to pursue the claim in the first federal habeas corpus proceeding. Thus, the Eleventh Circuit Court of Appeals did not violate Rule 52(a) of the Federal Rules of Civil Procedure, but applied the clearly erroneous standard only to what were true factual findings.

Petitioner also asserts that the Eleventh Circuit Court of Appeals created some type of new standard with regard to abuse of the writ and issues that have been deliberately abandoned. Respondent asserts that the Eleventh Circuit did no more than apply a correct meaning to the terminology "deliberate abandonment". The Eleventh Circuit Court of Appeals did not reweigh factual evidence, but examined the facts as presented in the record in the district court in light of a correct legal standard. Perhaps the most telling fact which is not disputed by counsel is that had counsel made a simple inquiry at the jail at the time of the filing of the first state habeas corpus petition and probably even at the time of the filing of the first federal habeas corpus petition, the jail records would have been in existence which would specifically designate the cell assignments for each individual prisoner and could have offered unrebuttable proof of Mr. Evans' whereabouts on every day while he was incarcerated in Fulton County Jail. Thus, there would have been no necessity in relying on the memories of individuals testifying ten years after the occurrence of the events.

Petitioner also asserts that the state deliberately concealed the written statement of Offie Evans. Petitioner ignores that the fact that the written

statement of Offie Evans was not the basis upon which the district court found a Massiah violation. In fact, the written statement of Offie Evans had very little to do with the district court's finding of a Massiah violation. The only thing upon which the district court relied was the testimony of Mr. Worthy. Whether the Petitioner actually had a written statement of Offie Evans is immaterial to the Massiah violation found by the district court. Petitioner's assertions that there have been ten years of perjury and deceit are simply unsupported by the record and are not only disputed by the Respondent, but contradicted by every witness who testified before the district court with the exception of one individual who had absolutely no reason to remember these events.

Respondent submits that contrary to Petitioner's assertions, the state is fully entitled to assert abuse of the writ. The question is not whether there was a constitutional violation but whether the district court should have reached the merits of the allegation at all. Petitioner's argument would virtually preclude the assertion of abuse of the writ in almost every instance until there had been a determination as to the merits of the underlying claim. Based upon Petitioner's theory, abuse of the writ can only be found when there is no merit to the claim asserted. This would totally vitiate the

doctrine of abuse of the writ. Although courts have found an abuse of the writ partially by finding that there is no merit to the allegation raised, there is absolutely no requirement that the allegation be meritless before a federal court can find abuse of the writ.

It is clear that the basis utilized by the Eleventh Circuit Court of Appeals for finding an abuse of the writ is one that has long been recognized by this Court. As early as Sanders v. United States, 373 U.S. 1, 18 (1963), this Court acknowledged that an abuse of the writ could be found if one "deliberately withholds . . . grounds for federal collateral relief at the time of filing his first application. . . ." Furthermore, the Court went on to hold, "the same may be true if . . . the prisoner deliberately abandons one of his grounds at the first hearing." This serves one purpose of abuse of the writ doctrine, that is, to eliminate needless piecemeal litigation. Furthermore, this Court has also held, "successive petitions for habeas corpus that raise claims deliberately withheld from prior petitions constitute an abuse of the writ." Woodard v. Hutchins, 464 U.S. 377 (1984). See also Antone v. Dugger, 465 U.S. 200, 206 (1984) (noting, "as applicant had presented each of these claims to the state court before the first petition for habeas was filed . . . applicant hardly can contend that these claims were unknown to him at that time.").

The Eleventh Circuit Court of Appeals properly applied the precedent of that circuit and of this Court in concluding that Petitioner had done exactly what the abuse of the writ doctrine says he cannot do, that is, raise a claim at the first state habeas corpus proceeding and then deliberately choose not to raise it in the first federal habeas corpus proceeding and subsequently seek to raise it at a later proceeding. The failure to raise the claim in this case is particularly egregious when Petitioner was also raising a separate claim challenging the testimony of Offie Evans under Giglio v. United States, 405 U.S. 150 (1972), and when that very issue served as the basis for the same district court judge's initial reversal of the Petitioner's murder conviction and sentence in the first federal habeas corpus proceeding and that specific finding was reversed by the Eleventh Circuit Court of Appeals sitting en banc.

Respondent would thus submit that the Eleventh Circuit Court of Appeals properly found that the district court abused its discretion and that there was an abuse of the writ by Petitioner's having deliberately abandoned the allegation of the Massiah violation. The district court was incorrect in reaching the merits of the claim in the first instance and was incorrect in its legal analysis of the claim. Furthermore, the Eleventh Circuit Court of

Appeals was correct in its conclusion that counsel had not conducted a sufficient investigation so that the Court should ignore the deliberate abandonment of the claim. It should be noted ironically that counsel pursued a claim asserting discrimination in the application in the death penalty in his first federal application for habeas corpus relief when he did not even have completed studies at the time the petition was filed but only had the studies completed during the litigation on the first federal habeas corpus action. To assert that counsel simply chose not to raise this one issue because he did not find a sufficient factual basis to prove the claim does not undercut the fact that counsel simply did not present this issue to the district court for its resolution in the first federal habeas corpus action.

Respondent thus submits that as the Eleventh Circuit Court of Appeals applied the appropriate legal principles in making an evaluation of the abuse of the writ question, there exist no basis for the granting of certiorari by this Court.

II. THE HARMLESS ERROR ANALYSIS CONDUCTED BY THE ELEVENTH CIRCUIT COURT OF APPEALS IS NOT ESSENTIAL TO A RESOLUTION OF THE ABUSE OF THE WRIT QUESTION AND, FURTHERMORE, THE CONCLUSION BY THAT COURT THAT ANY ALLEGED ERROR WAS HARMLESS IS CORRECT.

Petitioner asserts two bases for this Court's granting review to examine what is simply an application of a harmless error rule. Petitioner first asserts that this Court should grant review to consider the application of Rule 52(a) to a harmless error analysis. Petitioner also asserts that the harmless error analysis conducted by the Eleventh Circuit Court of Appeals was incorrect.

Respondent would first assert that the harmless error analysis conducted by the Eleventh Circuit Court of Appeals was unnecessary to the resolution of the abuse of the writ question. The Eleventh Circuit Court of Appeals found an abuse of the writ by the deliberate abandonment of the claim. The Court then went on, however, to examine the question in light of an ends of justice analysis. Respondent would submit that this type of analysis is contemplated only in cases in which issues have been raised and litigated previously. In Kuhlmann v. Wilson, 477 U.S. 436 (1986), the Court did examine the

meaning of "ends of justice" but in the context of the question of relitigating issues, not in a context of addressing issues which had been deliberately abandoned. Respondent would submit that once an issue has been deliberately abandoned, the ends of justice analysis is simply not necessary.

Respondent would also submit that there exists no basis for this Court's granting review to simply examine a question of the applicability of the clearly erroneous rule under the circumstances of this case. Petitioner again focuses on purported findings by the district court while failing to point out that the only findings by the district court in relation to the harmless error analysis are derived strictly from the trial transcript, not from any live testimony presented before the district court. In fact, the district court itself specifically ignored prior findings by the Eleventh Circuit Court of Appeals sitting en banc. Under these circumstances, there was no reason why the Eleventh Circuit Court of Appeals could not rely on its own prior opinion and rely on exactly what it observed from the trial transcript in making a harmless error analysis. The district court's statements that certain things were testified to at trial did not amount to findings of fact, but simple citations from the transcript. The Eleventh Circuit Court of Appeals is fully capable of making its own citations to the transcript. The district court did not make any independent factual findings regarding trial testimony as

the district court did not have those witnesses before it for making any credibility assessments. Thus, Rule 52(a) simply is inapplicable.

Petitioner specifically asserts that the district court's holding violated Amadeo v. Zant, ___ U.S. ___ 108 S.Ct. 1771 (1988). Petitioner ignores the fact that in Ameado, the district court had live witnesses testifying in a habeas corpus proceeding and was not examining simply what took place at the trial of case. The error cited by this Court in Amadeo was the circuit courts's failure to apply the clearly erroneous rule to factual findings by the district oourt based on live testimony and to apply the rule to findings as to why an attorney engaged in a particular type of conduct. The Eleventh Circuit Court of Appeals in this case did not disagree with factual findings of this nature by the district court.

Petitioner primarily focuses on the purported finding by the district court that Offie Evans' testimony was critical to the state's case and the district court's purported findings that Ben Wright's testimony was obviously impeachable. Petitioner ignores the fact that these were precisely the considerations that the Eleventh Circuit Court of Appeals engaged in sitting en banc upon review of the first federal habeas corpus action. It was this holding by the Eleventh Circuit Court of Appeals that the district court in this case ignored in making its harmless error analysis. In fact, the

Eleventh Circuit Court of Appeals did not state that it disagreed with the district court's finding as to Ben Wright's testimony, but did specifically disagree with the conclusion as to the nature of Offie Evans' testimony, relying on its prior holding. Under these circumstances, the clearly erroneous rule of 52(a) simply does not come into play.

Respondent would further submit that the Eleventh Circuit Court of Appeals properly found that any alleged constitutional violation was harmless beyond a reasonable doubt. That Court acknowledged the distinction between examining an issue alleged to be a violation of Giglio v. United States and an issue alleged to be a violation of Massiah v. United States. The Court also noted the holding of this Court in Satterwhite v. Texas, 486 U.S. 249 (1988).

This Court has acknowledged that Sixth Amendment violations under certain circumstances may be subject to a harmless error analysis. See United States v. Morrison, 449 U.S. 361 (1981). The Eleventh Circuit Court of Appeals made a correct analysis of the harmless error question utilizing the standard of Chapman v. California, 386 U.S. 18 (1967). Respondent submits that as the Eleventh Circuit Court of Appeals applied the proper standard in making the harmless error analysis, this Court should decline to grant certiorari simply to review the conclusion as to whether any alleged error was harmless.

Petitioner and the district court conclude that Evans' testimony was critical to establish that the Petitioner was the triggerman and to establish malice. This is based on testimony by Evans that the Petitioner admitted shooting the policeman, stated he wore makeup during the robbery and stated he would have shot his way out even if there had been a dozen policemen. Ironically, Petitioner now refers to Offie Evans as an apparently disinterested witness at the trial of the case, when the Petitioner has consistently asserted just the opposite, that is, that based upon some type of deal or agreement for Mr. Evans' testimony he was not a disinterested witness and was in fact a biased witness.

The Eleventh Circuit examined first the testimony of Offie Evans regarding Petitioner's admission that he was the triggerman. The Court noted the state presented a substantial amount of circumstantial evidence relating to this aspect of the case.

> McCleskey himself confessed to his participation in the robbery. The officer was killed by the man who entered and secured the front of the store while the other three men were in the back. McCleskey was identified by two of the store personnel as the robber who came in the front door.

> The officer was killed by a bullet from a .38 caliber Rossi handgun. The state presented evidence that McCleskey had stolen a .38 caliber Rossi in a previous holdup. The gun that McCleksey had stolen had a white handle. The state presented testimony from an eyewitness that the robber who ran out the front door after the robbery was carrying a pearl-handled pistol.

McCleskey, 890 F.2d at 352.

The Court also noted that Ben Wright, the co-defendant, also testified that McCleskey was the triggerman. The Court concluded that the other evidence at trial was such that the Court could conclude that any additional testimony by Offie Evans did not contribute to the verdict.

The Court also examined Mr. Evans' testimony relating to the assertion that the Petitioner was wearing makeup. This was examined by the panel as well as by the en banc court and was found not to crucial to the state's case. This fact lent proof to the assertion that the Petitioner was the robber entering the front of the store. There was already testimony directly to this effect by Ben Wright as well as two eyewitnesses to the crime and was corrobated by the Petitioner's own confession. Thus, this one aspect of the testimony also could reasonably have been said not to contribute to the verdict.

Finally, the other assertion relates to the testimony by Offie Evans that the Petitioner would have been willing to shoot his way out if there had been twelve policemen. Again, this particular piece of testimony, if erroneously admitted, was harmless beyond a reasonable doubt. As noted by the Eleventh Circuit Court of Appeals, this was not focused upon in the prosecutor's closing argument as the prosecutor argued malicious intent based upon the physical evidence that the Petitioner shot the police officer once in the head and a second time in the chest as he was dying on the floor of the store, that the Petitioner had a choice to surrender but chose instead to kill the police officer, thus indicating malice as well as arguing the one statement from Mr. Evans. Thus, the evidence pertaining to malice was overwhelming and the testimony of Offie Evans did not contribute to the verdict on malice murder. Furthermore, Mr. Evans did not testify at the sentencing phase of the trial and the testimony of Evans was not used by the prosecutor during his argument concerning Petitioner to portray Petitioner as a malicious criminal, but rather the prosecutor focused on the prior convictions of Petitioner.

Under these circumstances, Respondent submits that the Eleventh Circuit properly concluded that any alleged error was harmless beyond a reasonable doubt and properly distinguished this case from the decision in Satterwhite v. Texas, in which

the critical testimony was from a psychiatrist. There this Court noted that the testimony was important because of the qualifications of the psychiatrist and because of the "powerful content of his message." Id. Contrary to Satterwhite, the testimony in this case did no more than corroborate other evidence already in the record and, thus, was harmless beyond a reasonable doubt.

Respondent submits that the Eleventh Circuit Court of Appeals properly conducted the harmless error analysis, recognizing the distinction between a Giglio issue and a Massiah issue and properly found that even if there were a Massiah violation, the admission of the testimony of Offie Evans was harmless beyond a reasonable doubt. As the Eleventh Circuit properly applied the precedent of this Court, there exists no basis for this Court granting review to simply consider a harmless error analysis.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Respondent prays that the petition for the writ of certiorari filed on behalf of Warren McCleskey be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the Unied States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served a copy of the foregoing Brief in Opposition for the Respondent upon opposing counsel by depositing same in the United States mail with sufficient, first class postage affixed thereto, and addressed as follows:

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This 27th day of April, 1990.

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